

# EXHIBIT 5

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#30083

1 UNITED STATES DISTRICT COURT

2 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

3 HONORABLE OTIS D. WRIGHT

4 UNITED STATES DISTRICT JUDGE PRESIDING

5 - - -

6 DC Comics, )  
7 PLAINTIFF, )  
8 VS. ) NO. CV 10-3633 ODW  
9 Pacific Pictures Corporation, et )  
al., )  
10 DEFENDANT, )  
11 \_\_\_\_\_ )  
12  
13  
14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 LOS ANGELES, CALIFORNIA

16 WEDNESDAY, SEPTEMBER 5, 2012

17

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20 KATIE E. THIBODEAUX, CSR 9858  
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23 Los Angeles, California 90012  
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UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; WEDNESDAY, SEPTEMBER 5, 2012

2 1:30 P.M.

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6 THE CLERK: Calling Item 2, CV 10-3633, DC Comics  
7 versus Pacific Pictures Corporation, et al.

8 Counsel, may I have your appearances please.

9 MR. PETROCELLI: Thank you. Good afternoon, your  
10 Honor. Daniel Petrocelli with Matthew Kline, Dmitri  
11 Portnoi and Jason Tokoro for plaintiff DC Comics.

12 MR. TOBEROFF: Good afternoon, your Honor. Mark  
13 Toberoff for the defendants. I am here with my  
14 associates Keith Adams and Pablo Arredondo.

15 THE COURT: Gentlemen, good afternoon.

16 All right. We are here on plaintiff's motion  
17 for partial summary judgment on the first and third  
18 claims, and I believe everyone has gotten our tentative;  
19 correct?

20 MR. PETROCELLI: Yes, your Honor.

21 THE COURT: All right.

22 MR. TOBEROFF: Yes, your Honor.

23 THE COURT: Beginning with the moving party.

24 MR. PETROCELLI: Yes. Do you prefer that we --

25 THE COURT: Make yourself comfortable.

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1                   MR. PETROCELLI: I am actually more comfortable  
2 standing if that is okay with you.

3                   Your Honor, the central dispositive issue with  
4 respect to our first claim the termination notice of the  
5 Schuster heirs is ineffective is that the 1992 agreement  
6 replaced all prior agreements and grants and regranted  
7 new grants in 1992, and that would govern the parties  
8 fully and finally going forward.

9                   The copyright termination statute in all the  
10 cases, all of them, including Milne and Mewborn and  
11 Steinbeck all agree, and I believe even the defendants  
12 agree that if we are dealing with grants that were made  
13 after January 1, 1978, then there is no right of  
14 termination.

15                  If we are dealing with grants that still are  
16 in existence as of the time this notice of termination  
17 was filed in 2003, that were made prior to January 1,  
18 1978, then there may be a right of termination. We have  
19 to then go to our other arguments that we presented in  
20 our brief.

21                  I am going to focus mainly on what I think is  
22 the lynchpin argument which is the 1992 agreement, and  
23 the first case to really address the issue of what would  
24 happen if the parties entered into a new agreement after  
25 January 1, 1978 superseding and replacing the old

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1 agreements, whether that would extinguish any right to  
2 terminate was addressed in the Milne case by the first  
3 the District Court, the late Florence Marie-Cooper and  
4 then the Ninth Circuit.

5 In that case, the Milne case, I submit,  
6 directly deals with the issue at hand, namely that if the  
7 parties do enter into a new post 1978 agreement replacing  
8 the old agreement, there is no right to terminate. The  
9 copyright statute itself says that because it only  
10 applies, it only provides the right to terminate to the  
11 pre 1978 agreements and grants.

12 So Milne went on to address another argument  
13 made by Ms. Milne in that claim, Clair Milne, contesting  
14 the termination -- or advancing the termination right.  
15 Forgive me. And Clair Milne argued in that case, well,  
16 wait a second, there is another part of the copyright  
17 statute in the termination sections that says you can't  
18 have an agreement to the contrary.

19 So even though the parties enter into this new  
20 agreement replacing the old with a new set of grants,  
21 that is still an agreement to the contrary and that is  
22 still forbidden and you can't wipe out a termination  
23 right in that manner.

24 That issue was discussed at length in Milne,  
25 and the Milne court concluded that if the parties in fact

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1 have superseded their old agreement with a new agreement  
2 and it is after 1978, that is the beginning and the end  
3 of the analysis. It is straightforward because the  
4 copyright statute on its face only allows termination for  
5 pre 1978 grants. And all of the discussion on that case  
6 is really focused on this threshold issue which was the  
7 case of first impression there, of whether the other  
8 section dealing with a forbidden agreement to the  
9 contrary encompassed this type of agreement.

10                   And the court, after a lengthy analysis of the  
11 legislative history and the cases, concluded that you can  
12 supersede, revoke and replace, and that wipes out any  
13 right of termination. And there is nothing wrong with  
14 that. In fact, the court goes on to cite very important  
15 language in the congressional history whereby Congress  
16 made clear that nothing in this section or legislation is  
17 intended to change the existing state of the law of  
18 contracts concerning the circumstances in which an author  
19 may terminate a license, transfer or assignment.

20                   Indeed, Congress explicitly endorsed the  
21 continued right of parties to a transfer or license, to  
22 voluntarily agree at any time to terminate an existing  
23 grant and negotiate a new one. And that is at Pages 1045  
24 and 1046 of the opinion which is 430 F.3d. And then the  
25 court winds through additional points and concludes that

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1 superseding agreements are not subject to termination.

2 THE COURT: Is this a long way of saying you agree  
3 with the tentative?

4 MR. PETROCELLI: Yes. And I didn't want to be  
5 presumptuous, but that would pretty much sum it up,  
6 Judge.

7 THE COURT: Thank you, Mr. Petrocelli.

8 MR. PETROCELLI: So, unless the court has any  
9 questions, I would be prepared to defer. And, by the  
10 way, I am going to submit on the tentative even with  
11 respect to the majority interest issue which the court  
12 tentatively ruled against us unless you have questions or  
13 if I need to respond.

14 THE COURT: No. We will deal with that later.

15 MR. PETROCELLI: Thank you.

16 THE COURT: All right. Mr. Toberoff.

17 MR. TOBEROFF: Your Honor, since -- your Honor,  
18 since this is all about a half page agreement called the  
19 1992 agreement, and a lot of fancy arguments are being  
20 made about that page, I would like to set up that  
21 document for you.

22 THE COURT: I am not certain that there are any  
23 fancy arguments. We have an agreement supported by quite  
24 a bit of consideration, and isn't that kind of the end of  
25 it? Promises made that we will never again pursue any

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1 future interests in Superman, promises repeated over and  
2 over again. Where is the fancy part?

3 MR. TOBEROFF: I intend to explain all of that to  
4 you. First, I would just like permission to set that up.

5 THE COURT: Go ahead.

6 (Pause in proceedings.)

7 THE COURT: We spent a good deal of tax payer  
8 money to upgrade this courtroom, and we are still using  
9 those things?

10 MR. TOBEROFF: Well, I am using it so that we can  
11 really focus on this 1992 agreement.

12 That is the agreement in question, your Honor.  
13 First of all, I would like to tell you how much I  
14 appreciate the fact that the order you sent out was  
15 labeled a tentative order, and I am here to attempt to  
16 change your opinion about this matter by focusing on both  
17 the facts and the law.

18 THE COURT: Okay.

19 MR. TOBEROFF: The termination provisions were  
20 entered into, were enacted by Congress. They are very;  
21 unusual provisions because they cut through everything we  
22 are taught in law school that a deal is a deal, that you  
23 make a contract, if there is consideration for a  
24 contract, it is enforceable whether it is for \$10 or  
25 \$10 million. You stick by those contracts.

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1                   And Congress said with respect to authors and  
2 the Copyright Act, no. There is a tremendous imbalance  
3 of power between publishers and authors, and that means  
4 that when authors want to have their works published,  
5 they are going to have no leverage and those works may go  
6 on to become very, very valuable. And they will not have  
7 had the opportunity to have bargained for profits or for  
8 sufficient remuneration because they had no bargaining  
9 leverage.

10                  So what we are going to do is give you authors  
11 the ability after a very long waiting period, in the case  
12 of the terminations, 56 years, in the case of the  
13 Schusters under 304(d), 75 years, we are going to give  
14 them an attempt to realize some of the increased market  
15 value of their works because when they first made the  
16 deal with the publisher, not only didn't they have any  
17 leverage but no one really knew what the value of these  
18 creations were.

19                  And, understand, large companies use  
20 copyrights for exclusivity and to profit, but the reason  
21 for copyright law to begin with is to provide financial  
22 incentives for people to create because by providing  
23 authors financial incentives, it is thought to be good  
24 for commerce and good for a culture.

25                  Siegel and Schuster who created Superman

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#30092

1 before there were any superheros and signed a document  
2 with a small publisher, a release to have that publisher  
3 publish Superman and got paid \$130 were later held in  
4 1947 and again in '74 to have sold all their rights for  
5 \$130, the poster boys for the termination provisions.

6 When people talk about the legislative intent  
7 to correct the imbalance of power between authors and  
8 publishers, they often refer to Siegel and Schuster  
9 selling Superman for \$130.

10 THE COURT: Is that your position is that they  
11 sold Superman, and all they were compensated was \$130?  
12 Is that your argument?

13 MR. TOBEROFF: That is what they were originally  
14 compensated.

15 THE COURT: No. No. is that what you are trying  
16 to tell me?

17 MR. TOBEROFF: No. That is the beginning of the  
18 story. That is the beginning of the story.

19 THE COURT: Okay. Pretend that we don't have a  
20 jury here and be factually accurate. All right.

21 MR. TOBEROFF: All right. Your Honor, the -- so  
22 the purpose of the termination, so concerted was the  
23 legislative intent to give you authors and their families  
24 a termination right, that they put into the termination  
25 provisions, a provision that said termination can be

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1 affected notwithstanding any agreement to the contrary.

2 This is a statutory prohibition because they  
3 realized that as soon as they give this termination right  
4 to authors that publishers would use their bargaining  
5 leverage when they make deals with authors to assent away  
6 their termination rights, to circumvent termination  
7 rights, to encumber termination rights.

8 And so in the first case that dealt with this  
9 language which is Marvel versus Simon which dealt with  
10 Captain America, another superhero. Simon had signed a  
11 settlement agreement in a case where they were arguing  
12 over who had the rights to Captain America, and they  
13 resolved that case with a settlement agreement. And that  
14 settlement agreement said everything you did for us, we  
15 own all rights to Captain America. And everything you  
16 did for us was work for hire.

17 Later on, Simon sought to exercise his  
18 termination rights under the Copyright Act and the  
19 District Court in New York, Southern District, said you  
20 can't, you don't have any termination rights because you  
21 signed something saying it is work for hire. And if it  
22 is work for hire, you don't have any termination rights.  
23 And Simon argued that this is an agreement to the  
24 contrary, reading it this way is an agreement to the  
25 contrary, and the District Court said I don't think so.

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1 You are bound by your settlement agreement. You are  
2 done.

3 They went to the Second Circuit, and the  
4 second circuit reversed saying to the extent you can't  
5 after the fact nullify the termination right by calling  
6 works works for hire. That is an agreement to the  
7 contrary because the way Marvel was reading the agreement  
8 has the effect of extinguishing the termination right.  
9 And that is prohibited by the Copyright Act. It is void  
10 to the extent it nullifies the termination right. That  
11 was the first major case dealing with this provision  
12 notwithstanding any agreement to the contrary.

13 Now, we get to the Milne decision in the Ninth  
14 Circuit which is a different situation. In Milne, the  
15 son, Christopher Milne, was in the termination window.  
16 He had a termination right. He was going to terminate,  
17 and he went to the original grantee which was  
18 Schlesinger, Inc., SSI, and said I am going to terminate  
19 that 1930 grant and then I will get the rights back and I  
20 might renegotiate a new deal with you or I might sell  
21 them to somebody else. And like Superman, the  
22 Winnie-the-Pooh rights, it was a billion dollar  
23 enterprise.

24 And SSI said, wait a minute, don't do that,  
25 why don't we negotiate a new deal now. So wielding the

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1 threat of termination, they said rather than statutorily  
2 terminate the 1930 grant and then enter into a new  
3 agreement, let's do it contractually.

4 And so they entered into an agreement, a  
5 multi-page agreement that did a number of things. One,  
6 it expressly revoked the old 1930 grant. Two, it  
7 expressly said that we are doing this because of your  
8 termination right and we are doing it in lieu of  
9 termination. Three, it expressly regranted the exact  
10 same copyrights granted in the 1930 grant because the  
11 whole purpose was to replace that grant. All of it was  
12 express. And, as a result, Christopher Milne ended up  
13 with an additional \$300 million.

14 Now, the court said since the purpose of  
15 termination is to allow authors and their families to  
16 realize the increased market value of their works years  
17 later, and that is exactly what Christopher Milne was  
18 doing. He was using the leverage of termination to do  
19 that.

20 The court reasoned that, although they didn't  
21 follow the statutory formalities of termination, we  
22 achieved a congressional objective. He used the  
23 termination as leverage to bargain a new deal, and that  
24 new deal corresponded to the value of the Winnie-the-Pooh  
25 franchise in question. And, then, thereby created a

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1 narrow exception to what, to the prohibition of you can  
2 terminate notwithstanding any agreement to the contrary.

3 So you could be sure after the Milne case that  
4 every time you exercise, an author or family exercised a  
5 termination right with respect to something of value,  
6 what is the publisher going to say? Revocation and  
7 regrant. They are going to find a post '78 agreement and  
8 call it a revocation and regrant.

9 And that is exactly what happened in the  
10 Mewborn case that I litigated. They found a '78  
11 agreement that assigned the exact same thing as a '76  
12 agreement, motion picture television and allied rights,  
13 they both had the exact same, very similar language, and  
14 they said the '78 agreement, by dealing with the same  
15 subject matter, effectively supersedes the '76 agreement,  
16 and therefore you have no agreement that you can  
17 terminate.

18 And they read into the agreement a revocation  
19 and a regrant, and the district court bought that  
20 argument and said you have no termination right. All you  
21 have is this 1980 agreement because the 1975 agreement by  
22 dealing with the same subject effectively superseded even  
23 though, and we argue, there is no language of revocation  
24 and regrant. In Milne, it was express. Here, there is  
25 no language. You can't reform an agreement for the

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#30097

1 parties.

2 It went up to the Ninth Circuit and in  
3 Mewborn, and the Ninth Circuit agreed. The Ninth Circuit  
4 said we are going to limit our ruling in Milne to the  
5 factual circumstances of Milne which is someone with a  
6 current termination right uses that termination right as  
7 leverage to bargain for a new deal for value relative to  
8 the market value of the copyrights they are dealing with.

9 And the important point is the use of the  
10 termination right by leverage because the court concluded  
11 in Milne that is how you realize the congressional  
12 objective, and as long as that is being realized in a  
13 real way, we are okay with that. But that is not what  
14 happened in Mewborn.

15 The court said there is no express revocation.  
16 Mewborn, she had termination rights, but they wouldn't  
17 come up for another 16 years. So it wasn't relevant to  
18 the negotiation. The amount of money involved was a few  
19 thousand dollars, didn't reflect the value of Lassie.  
20 And it said, therefore, because the factors in Milne were  
21 not present here, we are not going to read a revocation  
22 into that. We are not going to take this termination  
23 right away from this person given this concerted  
24 legislative objective behind the right.

25 Steinbeck which is relied on heavily in the

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1 tentative is not binding, but Steinbeck is not against  
2 our position. Steinbeck supports Milne. In Steinbeck,  
3 the court noted that Elaine Steinbeck wielded the  
4 termination right to bargain for a substantially enhanced  
5 deal. And that substantially enhanced deal was major  
6 advances, major royalties.

7 So Steinbeck does not contradict. But I would  
8 submit, your Honor, that the two Ninth Circuit cases in  
9 Mewborn and Milne are what is most relevant and binding  
10 here although Steinbeck can also be instructive.

11 So, now, let's go to, if I may, your Honor, to  
12 the 1992 agreement, and I would like to talk about what  
13 it is and it isn't. And a bit of history about Siegel  
14 and Schuster. In 1938, there was -- the core grant of  
15 Siegel and Schuster's Superman copyright which is really  
16 their, the Superman character and the initial Superman  
17 story from which everything else is derived, that was  
18 granted in the 1938 grant. That was -- it was then  
19 litigated in 1947 where Siegel and Schuster litigated  
20 whether they had rights to Superman from the 1938 grant,  
21 and the court said they do, they have all rights under  
22 the 1938 grant and they entered into a stipulated  
23 judgment.

24 Then, in 1974, Siegel and Schuster were in  
25 court again, and the court focused again on the 1938

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1 grant, your Honor, and they said based on the 1947 case,  
2 DC owns all rights to Superman based on the 1938 grant.  
3 So you have two court decisions upholding this 1938  
4 grant, and then, after that, there are various other  
5 assignments from Siegel and Schuster that DC has relied  
6 on for years for its chain of title to Superman.

7 In 1975, due to negative publicity regarding  
8 DC's and Warner Brothers' treatment of Siegel and  
9 Schuster, the cartoonist's guild and various other  
10 parties objected. Warner Brothers were coming out with a  
11 big Christopher Reeve movie, they engineered the 1975  
12 agreement.

13 The 1975 agreement restored their credit which  
14 had been taken away for years because they had sued DC,  
15 and it provided them a pension of \$20,000 each which  
16 they, after that, they raised that pension. And it said  
17 when Joe Schuster dies, we are going to give his brother  
18 Frank Schuster a \$5,000 survivor pension. And it also  
19 acknowledged that, as of 1975, Siegel and Schuster had  
20 just lost the 1974 case, acknowledged that DC owns all  
21 right, title and interest to Superman.

22 So, in 1992, when this document was entered  
23 into, Jean Peavy and Frank Schuster didn't own any rights  
24 to the Superman to grant. Like Mewborn, in the Lassie  
25 case, the court said a 1978 agreement assigning motion

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1 picture and television rights to Lassie is a nullity  
2 because you already signed it in 1976.

3 So, here, just to set the stage, Jean -- the  
4 siblings of Joe Schuster, Frank Schuster and Jean Peavy  
5 who signed this 1992 document, their rights -- they  
6 didn't have any rights to Superman. What they had was  
7 the right to a \$5,000 pension.

8 And that is what this document is about, your  
9 Honor, and I can show you based on other evidence that  
10 that is what this document is about. So if you turn to  
11 the first paragraph of this document, it is basically a  
12 three paragraph agreement, it provides them with a  
13 \$25,000 pension.

14 There is another document that was signed on  
15 the same date by Frank Schuster which I can put on on  
16 this machine for you, but that document, I can read it to  
17 you, it is Exhibit 9 to the Petrocelli declaration. It  
18 says, in consideration of the agreement dated as of  
19 August 1, 1992, with DC Comics between DC Comics and  
20 myself, I hereby waive any rights and remedies they may  
21 have under the agreement dated December 23, 1975. That  
22 is the 1975 agreement that gave them a \$5,000 pension.

23 In giving them a pension, they threw in a  
24 quitclaim. Now, and that is the language that the court  
25 in its tentative focused on and found to be broad or

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1 construed as superseding, but what is noteworthy and why  
2 I call it a tentative is the transfer language says and  
3 this is the key, this is the yellow highlighted portion  
4 on the board that I put in front of you. It says,  
5 that -- excuse me, your Honor. Just need a sip of water.

6 It says we ask you to confirm by your  
7 signature below that this agreement fully settles all  
8 claims to any payment or other rights or remedies which  
9 you may have, meaning Frank Schuster and Jean Peavy.  
10 They didn't have any rights at that time, but it said any  
11 rights you have under any agreement. And then it says  
12 down below, whether now or hereafter existing, and then  
13 it says down below, and they grant those rights which you  
14 may have. And it says it assigns such rights.

15 Do you see that, your Honor? The focus is on  
16 the rights that Frank Schuster and Jean Peavy had, not on  
17 the original Superman copyrights of Siegel and Schuster  
18 that were granted in 1938 and acknowledged in 1975.

19 And there is no basis, I respectfully submit,  
20 your Honor, for -- to read into this document as a  
21 revocation or regrant.

22 And I put to the court, why would DC who has a  
23 1938 grant upheld in two court judgments to give them all  
24 rights to Superman and in an acknowledgment by 1975 by  
25 Siegel and Schuster that they already own all rights to

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#30102

1 Superman, why would DC feel the need to revoke all of  
 2 that chain of title that it has relied on for years and  
 3 replace it with an ambiguous document like this? If they  
 4 were really revoking these pre '78 copyright grants.

5 They have a multibillion dollar Superman  
 6 franchise. It just, it defies credibility to suggest  
 7 that Warner Brothers and DC are going to be launching  
 8 movies that cost, those Superman movies cost about \$250  
 9 million a pop with another 150 million in print and  
 10 advertising and marketing cost. That is \$400 million a  
 11 motion picture. They have investment partners. They  
 12 have insurance.

13 It defies credibility to suggest that they are  
 14 going to throw away the chain of title that they have  
 15 relied on for years that has been upheld by two court  
 16 judgments and replace it with this half-page ambiguous  
 17 scenario here.

18 And if DC which is an intellectual property  
 19 company with inside counsel and outside counsel and  
 20 Warner, in particular, if they intended to revoke those  
 21 prior agreements, it would have been easy enough to say  
 22 it in plain English, or as my father says in plain  
 23 Brooklyn English. If that was their intention, they  
 24 would have put it in the contract.

25 They know how to say we hereby cancel the 1938

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1 grant or refer generally we hereby cancel all pre '78  
 2 grants. They didn't do so. Not only does it suggest  
 3 that wasn't DC's intent or the parties' intent, but if  
 4 they wanted a revocation, it was incumbent upon them to  
 5 say so because courts whether it is New York or  
 6 California, all courts say you are bound by the objective  
 7 manifestation of your intent. I am not interested in  
 8 after the fact rationalizations and self-serving  
 9 declarations years later. I am going to look at the  
 10 document that you signed. So none of this is in there.

11 There is no language of rescission, there is  
 12 no language of revocation, and the -- the sweeping  
 13 language, your Honor, is language about their rights.  
 14 Jean Peavy, it says rights that, quote, you may have, and  
 15 the only rights that Jean, that Frank Schuster had was  
 16 rights to a \$5,000 pension. That is why the first  
 17 paragraph talks about the pension, and that is why a  
 18 letter he signed on the same date talks about he is  
 19 waiving his rights to that pension under the 1975  
 20 agreement.

21 Now, the court mentioned in its tentative that  
 22 we didn't come up with any evidence. Well, first and  
 23 foremost, the evidence of no revocation, your Honor, is  
 24 the 1992 agreement itself. Secondly, and that is why  
 25 this should end, but if we go outside that and start

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#30104

1 looking at extrinsic evidence, the evidence is abundant.  
2 And it all points to the fact that this agreement had  
3 nothing do with termination and nothing to do with the  
4 revocation and regrant. And I would like to briefly take  
5 you through that, your Honor.

6 Number one, Paul Levitz was the president,  
7 long time president of DC. Paul Levitz's name is on the  
8 document, and Paul Levitz managed the relationship with  
9 the Schuster heirs, the Schuster siblings, Jean Peavy and  
10 Frank Schuster. He submits a four or five page  
11 declaration. He talks about the generosity of DC. He  
12 talks about how they met in New York prior to signing  
13 this agreement. He talks about how the -- it was  
14 expressed at their meeting that they were going to  
15 increase the \$5,000 pension and make it \$25,000.

16 The silence is deafening. He doesn't say a  
17 word about revocation and regrant. Now, he is the  
18 president of DC. He is not going to lie in a sworn  
19 declaration. That is why he says nothing about  
20 revocation or regrant even though he is submitting the  
21 declaration in support of their motion and not a word  
22 about revocation or regrant.

23 When the Schusters served the termination in  
24 2003, did DC or Warner Brothers hop up and say you can't  
25 do that, you have no termination rights. You have a

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#30105

1 revocation and regrant, this 1992 agreement. Not a word  
2 about the 1992 agreement, your Honor.

3 In 2005, they send a multi-page letter to the  
4 Schusters trying to get them to settle. And in that  
5 agreement, they take on the Schuster termination. They  
6 don't mention the 1992 agreement in 2005 either.

7 It bears mentioning, your Honor, when we are  
8 talking about settlement and we are talking about  
9 leverage and the termination right in that agreement  
10 which they have made, in that letter which they have they  
11 have made public, just for starters, they offered the  
12 Schusters \$2 million, a percentage of the profits which  
13 starts to reflect the leverage of termination because  
14 then they really exercised their termination and it was  
15 exercised by the party with the termination rights which  
16 was the Schuster executive.

17 THE COURT: Couple of things. I need you to slow  
18 down a little bit.

19 MR. TOBEROFF: I am sorry.

20 THE COURT: And are you talking about negotiations  
21 that were taking place between the parties in connection  
22 with settlement?

23 MR. TOBEROFF: Yes, your Honor. But it is in a  
24 letter that they put into evidence in this case.  
25 Otherwise, I wouldn't be talking about it. It is a

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#30106

1 document that they have relied on, your Honor. That is  
 2 why I am talking about it.

3 So in 19 -- 2008, in the Siegel case where the  
 4 Siegel termination was upheld, it was argued that even  
 5 though the Siegel termination was upheld, Warner can  
 6 continue as they could to exploit Superman because they  
 7 were successors to Joe Schuster's half of the copyright.  
 8 And they were successors to Joe Schuster's half of the  
 9 copyright that was granted in the 1938 grant which is the  
 10 key grant upheld in two court judgments.

11 So in 2008, after the termination was served  
 12 in 2003, they didn't say to the court that our chain of  
 13 title to Joe Schuster has been replaced by a 1992  
 14 agreement. Again, they made no mention of the 1992  
 15 agreement. You know what the first time is that they  
 16 mentioned the 1992 agreement? After they replaced their  
 17 lawyers and they hired new counsel, and new counsel came  
 18 up with this theory.

19 But, that is what I meant, your Honor, when I  
 20 was talking about fancy. I wasn't referring to your  
 21 tentative. I was referring to a new argument that is  
 22 being contrived by lawyers that bears no relation to the  
 23 actual document that was signed by the parties. That is  
 24 what I meant by that comment.

25 There is other evidence, your Honor, even the

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#30107

1 evidence that they point to, that actually runs in our  
2 favor, and I have to dial it back just a little bit, and  
3 I will try and slow down. I'm sorry.

4 The key factor in the Milne case was that the  
5 holder of a current termination right within the  
6 termination window is going to use the termination to  
7 bargain for a much better deal that bears some  
8 resemblance to the market, increased market value of what  
9 they are bargaining for.

10 Here, this never took place. Frank Schuster  
11 didn't have a termination right. He is the brother of  
12 Joe. Jean Peavy didn't have a termination right despite  
13 their mentioning things in letters about termination.  
14 They are not lawyers. They don't know what they are  
15 talking about. They don't have a termination right.

16 THE COURT: Why not? Jean?

17 MR. TOBEROFF: Because siblings don't have  
18 termination rights.

19 THE COURT: What about as the executor?

20 MR. TOBEROFF: She wasn't the executor. The  
21 estate was never probated.

22 THE COURT: She was named as executrix in the  
23 will; right?

24 MR. TOBEROFF: That's right, but the estate was  
25 never probated. What happened was she was a beneficiary.

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#30108

1 The estate was in probate because they didn't have any  
 2 money. She sent -- when you have a pauper's estate, you  
 3 don't have a probate estate. He had a few shares of  
 4 stock, and she sent in -- there is a regulatory  
 5 declaration you can send in saying these are his assets.  
 6 His assets are some shares, ironically, of Time Warner  
 7 stock and can you send me the stock. And they did that.  
 8 It was never probated.

9 Then what happened was in 1992, nobody had --  
 10 even if she was an executrix in 1992, she didn't have a  
 11 termination right because executors of estates didn't get  
 12 termination rights until 1998 under the Copyright Term  
 13 Extension Act. So in 1992 -- first of all, so Jean  
 14 Schuster, Jean and Frank had never had any termination  
 15 rights, ever. In 1992, no one had termination rights  
 16 despite mentions in letters to termination rights.

17 So, interestingly, they point, they say, well,  
 18 termination was mentioned in letters from Jean Peavy,  
 19 and, therefore, she used it as leverage to bargain for a  
 20 new deal. And what I submit, your Honor, is let's say  
 21 Jean thought she had termination rights, DC knows she  
 22 doesn't have termination rights. Their lawyers know who  
 23 had termination rights and who don't. And even if Jean  
 24 and Frank thought they were using termination rights,  
 25 they didn't have termination rights. And if they don't

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#30109

1 have them, how can it be used as leverage to negotiate a  
2 better deal thereby fulfilling the congressional intent  
3 of the termination provision? It couldn't. It never  
4 happened.

5 And I submit that DC is reinventing history.  
6 It is not in the agreement, and it is not in their  
7 letters. And I will give you another example. Exhibit  
8 43 is a letter dated July 10, 1993 from Jean Peavy to  
9 Paul Levitz. Because it is in 1993, it took place after  
10 1992. They claim that the intent of the parties in 1992  
11 was to relinquish their termination rights. The intent  
12 of both DC and Jean Peavy was to relinquish their  
13 termination rights.

14 So if she relinquishes the termination rights,  
15 how come in 1993 she refers to termination rights in  
16 trying to ask them for even another increase in their  
17 pension? She says, during the past year, Frank and I  
18 have been able to review our rights as Joe's only  
19 surviving next of kin. We are aware of the fact that in  
20 1994 after 56 years, Superman could revert to us.

21 She is talking about that in 1993 after she  
22 signed that. The 56 years is the window for the first  
23 termination right. She is talking about termination.  
24 She doesn't know what she is talking about because Frank  
25 and her don't have any termination rights, but it

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#30110

1 certainly suggests that she didn't relinquish them in  
2 1992 if she is talking about it in 1993.

3 Then, in response, and I can put this on the  
4 elmo. I don't know. Would you like to look at it, your  
5 Honor?

6 THE COURT: Do you want me to look at it?

7 MR. TOBEROFF: Well, I will show you another  
8 document. I'm sorry. It is exhibit -- it is Exhibit 20  
9 to Petrocelli's declaration, a letter dated July 10,  
10 1993. So then, in response, Paul Levitz, the same Paul  
11 Levitz who sent in a declaration never mentioning  
12 revocation or regrant, he writes a letter back.

13 And he says, as I hope you recall from our  
14 meetings in New York, we have done extensive research  
15 into the Copyright Act and any potential rights that you  
16 and Frank may have as Joe's siblings and survivors. It  
17 is our firm conviction based on that research and expert  
18 counsel that you don't have any legal rights or claims  
19 whatsoever.

20 Now, he is telling them what we know, that  
21 they didn't have any rights. All they have for rights  
22 was a \$5,000 pension. So he says -- but he starts out  
23 the paragraph, I hope you recall from our meetings in New  
24 York that we have done extensive research and that you  
25 don't have any rights.

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#30111

1                   Well, in his declaration, the meetings in New  
 2 York he is talking about are meetings that took place he  
 3 says in late September before they signed this in  
 4 October. So what he is saying is before we signed this  
 5 thing, the reason we are only giving you \$25,000 a year  
 6 split two ways and we are going to deduct taxes from that  
 7 as well is because you don't have any rights. This is an  
 8 act of charity. And that is why they did it.

9                   Now, a key point -- so the things they point  
 10 to as being evidence -- and in the tentative, it says we  
 11 don't present any evidence -- all of this, the 1992  
 12 agreement, these letters are all evidence that it wasn't  
 13 the intent of the parties.

14                   THE COURT: That is not a complete sentence.

15                   MR. TOBEROFF: Sorry. Did I miss something  
 16 grammatically?

17                   THE COURT: No I just missed something. You said  
 18 it wasn't the intent of the parties.

19                   MR. TOBEROFF: Oh. Excuse me. That it wasn't the  
 20 intent of the parties to relinquish termination rights  
 21 which they didn't have, that it wasn't -- there was no  
 22 use of the termination right to achieve a congressional  
 23 purpose of being able to bargain a new deal that is  
 24 relative to the increased market value of the copyrights  
 25 in question.

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#30112

1                   THE COURT: Now, we understand that each party has  
2 different interests here with respect to termination  
3 rights.

4                   DC is not anxious for any of the heirs or  
5 putative heirs to terminate anything and reclaim any of  
6 their rights, is it?

7                   MR. TOBEROFF: Correct.

8                   THE COURT: All right. They are sitting on the  
9 golden goose. Now, with respect to the Schusters, they  
10 kept saying over and over again that they would not seek  
11 to reclaim any rights in the future. They said that over  
12 and over again. They made their intent clear; right?  
13 And I guess in exchange for that, DC continued to give  
14 them checks.

15                   MR. TOBEROFF: Correct, your Honor.

16                   THE COURT: Okay. Now, granted, DC acknowledges  
17 and I think we all acknowledge DC was not under any legal  
18 obligation to do so, was it?

19                   MR. TOBEROFF: Not at all. It was charitable.

20                   THE COURT: It was, and it also was designed to  
21 keep them happy and not make them start looking for  
22 perhaps other rights, get them a nice deal, a sweet deal,  
23 that goes on into perpetuity, and I don't know the extent  
24 to which it took care of their needs. But it seemingly  
25 made them happy year in and year out, all through the

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#30113

1 '90's. They kept getting checks, and I guess they were  
 2 happy with that. And I guess that means they didn't go  
 3 out and find a lawyer to research their rights under the  
 4 Copyright Act; right?

5 MR. TOBEROFF: No, your Honor. They were very  
 6 unhappy with that, and the letters that are all attached  
 7 to the declaration, every year, essentially when it comes  
 8 Christmas time, they are begging for money.

9 THE COURT: They may have been begging for money,  
 10 but then they would get money and then they would express  
 11 their gratitude.

12 MR. TOBEROFF: That's correct, your Honor. But I  
 13 am glad you are bringing that up because I think that  
 14 goes to the core of this. This is a very unusual right.  
 15 It goes against everything that we are taught in law  
 16 school, like I said, at the beginning of this, that a  
 17 deal is a deal, that you have a contract.

18 Let's just say for hypothetical purposes that  
 19 Jean Schuster was the executrix and there was an estate  
 20 and she did have the power of termination and she signed  
 21 a document that said I hereby state that I will never,  
 22 ever in consideration for \$25,000 a year exercise my  
 23 termination right. That wouldn't -- that would be void.  
 24 That would be totally void.

25 Why? Because of the provision in the

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#30114

1 termination that says the termination right is  
 2 inalienable. You can't waive it, you can't encumber it,  
 3 you can't circumvent it. Why did the Congress make the  
 4 termination inalienable? And, by the way, your Honor, it  
 5 was held in two supreme court cases to be inalienable.

6 In Stewart v. Abend which is the famous  
 7 copyright case dealing with Rear Window and a case called  
 8 New York Times versus Tasini, they held the termination  
 9 right to be inalienable. Now, the question is why would  
 10 they take these rash measures which hamper freedom of  
 11 contract principles that we all learn in law school  
 12 govern parties' transactions. Why would they do that?

13 The reason is because they knew that the first  
 14 thing publishers would do is go to authors or the heirs  
 15 that don't have any money -- to many people \$25,000 a  
 16 year is a tremendous amount of money -- and they would go  
 17 to them and say we are going to give you \$25,000 not to  
 18 exercise your termination rights and you have to promise  
 19 never to exercise your termination rights and you have to  
 20 waive your termination rights. You have to agree never  
 21 to exercise those rights, or if you do exercise those  
 22 rights, we are going to penalize you and you have to pay  
 23 back all that money.

24 They knew that publishers would do that. They  
 25 didn't want publishers to do that because that would

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#30115

1 defeat the purposes of the termination, and that is why  
2 they had the provision notwithstanding any agreement to  
3 the contrary. That is why they had the provision.

4 So there is a -- forgive me, your Honor, there  
5 is a disconnect here, and that disconnect is totally  
6 understandable. And that is the same disconnect that we  
7 experienced in the district court in the Lassie case and  
8 that was experienced at the district court level in the  
9 Captain America case.

10 And that is people look at this through the  
11 glass of contract law not through the glass and  
12 objectives of the Copyright Act. This is a new area of  
13 law because these cases are now coming into existence  
14 because of the long waiting period, 56 years and 75  
15 years.

16 And you have these leading cases, but, believe  
17 me, the Ninth Circuit as it expressed in Mewborn and the  
18 Supreme Court takes this termination right very  
19 seriously, and the prohibition of notwithstanding any  
20 agreement to the contrary is very serious. They don't  
21 want people waiving their termination rights. And they  
22 said, Milne said under these specific factors, since the  
23 purpose of the termination right was really realized  
24 here -- really realized, excuse me -- the objective was  
25 realized, because the purpose was realized to the tune of

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#30116

1 a \$300 million increase, even though they didn't follow  
2 the formalities, they contractually terminated instead of  
3 statutorily terminated, we are going to let this go. But  
4 then in Mewborn, they are going to say we don't want  
5 publishers to go crazy with this revocation or regrant  
6 exception. If you don't have a factual scenario that is  
7 similar to Mewborn, it doesn't work and they struck it  
8 down.

9 And in Steinbeck which is relied on in the  
10 tentative, your Honor, the Steinbeck court says that  
11 Elaine Steinbeck wielded the termination right to bargain  
12 for a better deal. Here, Jane Peavy and Frank Schuster  
13 didn't wield anything. What they wielded was a \$5,000  
14 pension, and DC wielded a little money.

15 And there was -- DC has never acted as if this  
16 1992 agreement is the basis of its chain of title, and  
17 the reason, your Honor, why I wanted to put that  
18 agreement in front of you is because it really is not  
19 credible that Warner Brothers and DC is relying for  
20 \$400 million movies in a billion dollar business on this  
21 half page resolution in an agreement with Jean Peavy and  
22 Frank Schuster.

23 And there is discussion about understanding  
24 law in reviewing these contracts in the tentative, and I  
25 just want to point out that these cases of Milne and

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#30117

1 Mewborn which are Ninth Circuit cases are construing the  
2 prohibition of notwithstanding any agreement to the  
3 contrary in the Copyright Act. And in construing  
4 notwithstanding any agreement to the contrary, they are  
5 saying that a revocation and regrant must be express, and  
6 you must use the termination right which you must have as  
7 leverage to bargain a better deal.

8 And you must be within the termination window  
9 or near the termination window. In Steinbeck, they argue  
10 that they are not in the termination window. That is  
11 incorrect. We checked it out. Grapes of Wrath and other  
12 leading Steinbeck works were in the termination window,  
13 and there were a few Steinbeck works that were outside  
14 but close to the termination window. Therefore, they use  
15 the termination in Steinbeck as leverage to achieve a  
16 better deal thereby fulfilling the congressional  
17 directive of the termination right.

18 Nothing even remotely like that happened here,  
19 your Honor, because, number one, Jean Peavy and Frank  
20 Schuster had no termination rights and never had any  
21 termination rights. Number two, your Honor, nobody had a  
22 termination right in 1992. So they couldn't have used it  
23 as leverage.

24 And DC knew no one had any rights and they  
25 said in their letter referring to 1992 meetings before

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#30118

1 they signed this document that we analyzed this, and you  
2 don't have any rights. So no one could have used the  
3 termination right as leverage to bargain for a better  
4 deal, termination had nothing to do with this agreement.  
5 It was about a 1992 pension increase of the only right  
6 that Frank Schuster had which was a right to \$5,000 on a  
7 1975 agreement.

8                   And the 1975 agreement acknowledged that DC  
9 already owned all rights to Superman, and this came  
10 through in a quitclaim. And it therefore says you hereby  
11 grant to us, you settle any claims or rights and you  
12 grant to us all rights that you, meaning Frank Schuster  
13 and Jean Peavy had, not you grant us, regrant to us Joe  
14 Schuster's copyright grants and we revoke his prior  
15 grants.

16                   THE COURT: Wait a minute.

17                   There is really no dispute here then; right?

18                   MR. TOBEROFF: Excuse me, your Honor?

19                   THE COURT: What is the dispute? DC says it owns  
20 the rights. You agree. Why are we here?

21                   MR. TOBEROFF: The dispute, your Honor, is that DC  
22 owns the rights by virtue of a 1938 grant and some other  
23 grants.

24                   THE COURT: Okay.

25                   MR. TOBEROFF: The Copyright Act is, on an

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#30119

1 author's estate, the executor of an author's estate, the  
2 right to recover their copyrights after a very long  
3 waiting period by terminating all grants. They have to  
4 follow certain formalities.

5 THE COURT: Don't go through all that again.

6 There are no heirs, there is no spouse, there is no  
7 issue. There is no executrix. You just said that the  
8 Schusters had no rights. Why are we here?

9 MR. TOBEROFF: Your Honor, the Schusters --

10 THE COURT: They have no rights to reclaim.

11 MR. TOBEROFF: We are here because the chain of  
12 title to the Schuster copyrights is based on pre '78  
13 grants.

14 THE COURT: The chain of title. What chain of  
15 title? There was a works for hire back in 1938. Nothing  
16 has changed.

17 MR. TOBEROFF: The original Superman story was not  
18 a work for hire, and it was held in the Siegel case which  
19 this court granted a judgment on which said that it is  
20 not work for hire.

21 THE COURT: Okay. How did title to Superman,  
22 then, change from DC? And when?

23 MR. TOBEROFF: It changed -- it hasn't changed  
24 yet.

25 THE COURT: Okay.

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#30120

1                   MR. TOBEROFF: This is declaratory relief, to  
 2 declare that a termination notice that was filed in 2003  
 3 that becomes effective in 2013 is void, is ineffective.  
 4 So DC has Superman. They continue to exploit Superman,  
 5 but in 2013, they will have certain Superman copyrights  
 6 but will not have the original Superman story that was  
 7 created by Siegel and Schuster independently and was not  
 8 work for hire.

9                   THE COURT: Who will have that?

10                  MR. TOBEROFF: That will be owned by the estate of  
 11 Joe Schuster, and by the Siegels and most probably they  
 12 will enter into a new agreement with the natural buyer  
 13 for those rights since the rights are split. Other  
 14 people may be reluctant to buy those rights, but they can  
 15 sell them to somebody else. But, probably, they will  
 16 enter into a negotiation with Warner Brothers to make a  
 17 new deal with Warner Brothers. But it won't be a deal  
 18 for \$25,000 annual pension split two ways with taxes  
 19 deducted first. It will be a real deal that is relative  
 20 to the market value of Superman which is exactly what  
 21 Congress wanted.

22                  And, your Honor, the Siegel termination has  
 23 been upheld. There is no reason why the Schuster  
 24 termination shouldn't be upheld. It is the mirror image.  
 25 You are dealing with works that were co-created by Siegel

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#30121

1 and Schuster, and there is no reason why the Schuster  
2 termination shouldn't be upheld as the Siegel termination  
3 was upheld.

4                   And you can't take away this important right  
5 that Congress has given these people based on, you know,  
6 after the fact rationalizations when DC is bound by their  
7 own document. They drafted that document. If they  
8 wanted to revoke pre '78 grants, the 1938 grant upheld in  
9 two court judgments, why didn't they we hereby revoke  
10 those grants? Or why didn't they say we hereby revoke  
11 all prior grants and replace it with this grant?

12                  THE COURT: That is not a grant of anything, is  
13 it?

14                  MR. TOBEROFF: What?

15                  THE COURT: This August 1, 1992 letter isn't a  
16 grant of anything.

17                  MR. TOBEROFF: I agree. I agree, your Honor.  
18 That is what we are saying. They are saying that this  
19 August, 1992 letter did the following: Revoked Siegel  
20 and Schuster's prior copyright grants which DC has always  
21 relied and regranted Siegel and Schuster's copyrights to  
22 DC. And because it took place in 1992 and was signed by  
23 Schuster heirs, it can't be terminated and now we are  
24 bulletproof. And they never came up with that argument  
25 ever before.

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#30122

1                   They came up with that argument when they  
2 hired Mr. Petrocelli in 2010. That is when they first  
3 presented that argument even though the termination  
4 notices were served in 2003.

5                   THE COURT: Okay.

6                   MR. TOBEROFF: And looking -- the reason why I  
7 wanted to, you know, I know it is a little antiquated,  
8 your Honor, to do a big blowup like that on an easel.  
9 But the reason why I wanted to do that is because I  
10 wanted to put in front of you that half page agreement  
11 which all the fuss is about because it did not say any of  
12 the things that DC says it says. And with due respect, I  
13 think the court was to some extent led astray by some of  
14 these arguments which I call fancy arguments.

15                   And the reason I call them fancy arguments is  
16 there is no indication in that document of revocation or  
17 regrant. They say impliedly revoked by talking about the  
18 same subject matter, your Honor, but it doesn't talk  
19 about the same subject matter. It doesn't talk about Joe  
20 Schuster's original Superman copyrights. It says  
21 whatever rights you, Frank and Jean, have, and they  
22 didn't have any rights. And DC says in its letters you  
23 didn't have any right and the 1975 agreement says we  
24 already own all rights.

25                   THE COURT: All right. Tell me specifically what

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#30123

1 you mean when you say they don't have any rights,  
2 specifically, what are you saying? They also don't have  
3 any future rights?

4 MR. TOBEROFF: Jean Peavy and Frank Schuster had  
5 no rights to Joe Schuster's copyrights because they were  
6 long ago -- in 1992 because they were long ago assigned  
7 to DC by Siegel and Schuster. So in 1992, they didn't  
8 have any rights to give to DC. They also didn't have  
9 termination rights. That's what I mean.

10 THE COURT: Are you saying they also had never  
11 acquired termination rights?

12 MR. TOBEROFF: No. Siblings aren't entitled to  
13 termination rights. So what happened is the Siegels had  
14 termination rights because before 1998 --

15 THE COURT: No. Stay with the Schusters.

16 MR. TOBEROFF: Okay.

17 THE COURT: All right. And the Schuster estate  
18 will never acquire any termination rights, or will the  
19 executor be able to exercise those termination rights?

20 MR. TOBEROFF: The executor has termination  
21 rights. In 1998, the law changed. And, previously, only  
22 authors and statutory heirs were charged. By statutory,  
23 I mean spouse, children or grandchildren. That is it.  
24 Not siblings. Then in 1998, they said that is not really  
25 fair. What if you were never married or didn't have any

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#30124

1 children. We are going to give termination rights to the  
2 executor administrator of estates if there is no spouse  
3 or children.

4 And after 1998, that is the first time there  
5 was any possibility of a Schuster termination. Unlike  
6 the Siegels who terminated long before that because they  
7 had a spouse and a child that could terminate. So what  
8 do you do, then, when you terminate? You go to a court  
9 which they did, and you said he died, we didn't have  
10 enough money to bury him when he died therefore we didn't  
11 probate the will.

12 But, now, there is this new right. So we want  
13 to probate the estate for purposes of exercising this new  
14 right in the Superior Court of California. This was duly  
15 processed, petition for probate. They probated, and the  
16 will said I nominate, if the estate is probated, I  
17 nominate Jean Peavy as the executrix, but if she declines  
18 to act, I nominate Warren Peary, my nephew, as executor.  
19 And she declined to act because she was 82 at the time,  
20 and Warren Peary was nominated the executor. That is the  
21 first time anybody has the rights. And who has the  
22 rights? Warren Peary, the executor. He then files  
23 termination notices in 2003.

24 THE COURT: Wait a minute. Back up. You see that  
25 is the first time when Warren Peary was named the

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1 alternative executor, that is the first time anyone had  
2 any rights.

3 MR. TOBEROFF: Termination rights. Yes. Or any  
4 rights outside of a \$5,000 pension of Frank Schuster.

5 THE COURT: Well, didn't Jean have those rights  
6 before when she was the primary executrix?

7 MR. TOBEROFF: No, because you become -- you don't  
8 become executor or executrix unless there is an estate  
9 that is probated. And I am not a trust and estates  
10 lawyer, but my understanding is that when someone says in  
11 a will that you will be the executrix, it means if the  
12 estate is probated that you will be the executrix. I  
13 don't think she has legal power to sign things as the  
14 executrix if there is no estate over which to be an  
15 executrix. It is hard to pronounce that word.

16 THE COURT: Okay. I understand.

17 MR. TOBEROFF: So she didn't -- I don't believe in  
18 1998, that is why before termination notice could be  
19 served for the Schusters, they would have to probate the  
20 will. And they went to court and said we didn't probate  
21 the will before because there were no assets to be really  
22 concerned about that don't rise to the level of probating  
23 and under a special section for pauper's will, you can  
24 just distribute the few assets by sending in a piece of  
25 paper in the probate court or Superior Court.

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1                   So once they had this right, they then  
2 probated the estate. We served termination notices in  
3 2003. And from all this time from 2003 to 2010, no  
4 one said peep about you can't do this, the 1992  
5 agreement. If DC really believed that this was a bar to  
6 termination, wouldn't that be the first thing out of  
7 their mouths on getting this termination notice?

8                   And when they send a letter to the Schusters  
9 trying to settle and telling them if we settle with the  
10 Siegels before you, we are not going to settle with you.  
11 And we don't agree that this termination is valid.

12 Wouldn't they say remember the 1992 agreement you signed,  
13 that bars termination. They don't say anything about it.

14                   This is cooked up now, and I'm sorry to say it  
15 is a side show. Because if you really look at that  
16 agreement, your Honor, if a jury looked at that agreement  
17 or, I mean, let me put it this way, we are all lawyers  
18 here.

19                   If you were a lawyer for DC and your intention  
20 was to revoke all prior grants from Siegel and Schuster  
21 or from Schuster to DC of an important billing or a  
22 copyright like Superman, wouldn't you put in the  
23 agreement I hereby revoke all prior grants from Joe  
24 Schuster to Superman? Wouldn't you say I cancel those  
25 agreements? Wouldn't you say I rescind those agreements?

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1                   You would make it abundantly clear. You would  
 2 say we hereby revoke and rescind all prior grants by Joe  
 3 Schuster of Superman copyrights and including without  
 4 limitation, the 1938 grants. And we are hereby  
 5 regranting those rights. And you would do it -- that is  
 6 why they do it. Not only didn't they do it which casts a  
 7 great inference that that wasn't the intention of DC, but  
 8 it was incumbent upon them to do that.

9                   And they are bound by the objective  
 10 manifestations that are intent in this flimsy one page  
 11 letter. And I don't believe this is a sound basis to  
 12 deprive the second half of the copyright of their rights  
 13 under the copyright act. And, your Honor, this is a --  
 14 many think about this case as the seminal case dealing in  
 15 this area. First of all, it is dealing with Superman so  
 16 there is a tremendous amount of interest in the case.

17                   And, secondly, it is dealing with a lot of the  
 18 nuances of a fairly complicated area of law. There have  
 19 been law review articles about the Superman case.

20                   THE COURT: Hang on a second.

21                   That doesn't matter. None of that matters.  
 22 Let's stick with the issues of this tiny little case.  
 23 That is all I care about. I don't care what it will do  
 24 to history.

25                   All right. Have you made your arguments? You

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1 have been talking for an hour.

2 MR. TOBEROFF: And I greatly appreciate you  
3 letting me heard, your Honor. One last argument is that  
4 there is talk about New York law, and like I said before,  
5 the -- the Ninth Circuit cases that are binding, the  
6 Milne case and the Mewborn case, are dealing with  
7 copyright act and provision in the copyright act  
8 notwithstanding any agreement to the contrary.

9 They don't make, in construing that language,  
10 and in construing the narrow exception to that language  
11 in the copyright act, they don't make reference to state  
12 law. But even if you do look at New York law, New York  
13 law is not different than California law. In fact, New  
14 York law puts more emphasis on the objective  
15 manifestation of the parties' intent and doesn't look at  
16 extrinsic evidence and after-the-fact rationalizations.  
17 They look at the document. They say if it is not in the  
18 document, it is not there.

19 Number two, to find any kind of rescission,  
20 revocation or novation under New York law, the parties'  
21 intent to cancel and replace a prior agreement has to be  
22 unequivocal. Has to be crystal clear. Novation will  
23 never be presumed, the cases say.

24 Now, there is one case, I believe, cited by DC  
25 where they say novation can be express or implied, but in

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1 those cases where they are implied, it is crystal clear  
2 from all of the circumstances surrounding the agreement,  
3 that the intention was to revoke and replace an old  
4 agreement from all of the circumstances.

5 Here, it is the opposite. It is not  
6 unequivocal in this flimsy 1992 agreement, and all of the  
7 surrounding circumstances don't show any intent to  
8 revoke. And Levitz's declaration on the subject never  
9 mentions that the intent was to revoke, and he signed the  
10 agreement. And the letters show that there was no intent  
11 to relinquish termination rights so it is the opposite.

12 One can't find under New York law, an  
13 unequivocal intent of both parties to revoke these  
14 copyright grants on which DC has long relied. I submit,  
15 your Honor, it is impossible for this document to be the  
16 basis of Warner Brothers and DC's chain of title to a  
17 billion dollar franchise. Nobody would let that happen.

18 I know Warner Brother agreements and DC  
19 agreements. When they have somebody assign them  
20 copyrights, they have an agreement this thick. And they  
21 attach to it a short form assignment, and that short form  
22 assignment is filed with the copyright office to give the  
23 word constructive notice of their copyrights.

24 If this revoked all prior Superman grants and  
25 replaced it with this, that means this is the basis of

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1       their Superman franchise. And I submit that that is  
2       impossible that companies of this magnitude would have  
3       their lawyers draft something like this that their  
4       intention was to revoke all prior grants and regrant them  
5       the Superman copyrights. It is an impossibility.

6               THE COURT: What you suggest is lunacy. So, okay,  
7       I am sure that is not their intent.

8               MR. TOBEROFF: Then if it is not their intention,  
9       they still have the termination right. I agree with you,  
10      your Honor. It is not their intention.

11               Thank you.

12               THE COURT: Wrap up?

13               MR. PETROCELLI: Because of time constraints, your  
14      Honor, I am not going to try to respond to a lot of what  
15      Mr. Toberoff said. What I would like to do is just  
16      recenter the issue. When the Schusters served the notice  
17      of termination in 2003 for the very first time as  
18      Mr. Toberoff described, the Schusters relied solely on  
19      Section 304(d) of the copyright statute claiming that  
20      that section gave them the right to terminate  
21      notwithstanding all the prior history.

22               That section, your Honor, 304(d) specifically  
23      states that the right to terminate a copyright interest  
24      is only available for copyright grants or agreements  
25      before January 1, 1978. There is no right to terminate

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1 any grants after January 1, 1978. Nobody disagrees with  
2 that. Not certainly in the statute, and all the cases  
3 uniformly agree with it.

4 So, the issue in this case and that is the  
5 subject of the briefing in the court's tentative is  
6 whether in 2003, when the notice of termination was  
7 served, there existed any agreements or grants prior to  
8 January, 1978, or whether the only thing that existed was  
9 after January 1, 1978.

10 So that takes us to 1992. Because what  
11 happened in 1992 is that the parties entered into an  
12 agreement, the one you have in front of you which is  
13 indisputably governed by New York law where it was made.  
14 The defendants acknowledge that New York law applies in  
15 prior briefing, and the cases apply state law to  
16 interpreting a contract.

17 The issue in this case is not whether that  
18 1992 agreement waives a termination right. The issue is  
19 whether that 1992 agreement was intended to and did  
20 supersede and replace all prior agreements by the parties  
21 and insert in place of those prior agreements a new  
22 agreement going forward which we contend it plainly does.

23 THE COURT: Wait a minute. Do you say that this  
24 1992 letter is in effect a grant of a intellectual  
25 property interest?

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1                   MR. PETROCELLI: Correct. Correct. And I will  
2 walk you through that. Okay. And that has been the  
3 position that we briefed, that this document does  
4 two things. Okay. It, number one, replaces and  
5 supersedes and gets rid of all the other prior agreements  
6 so there can be no further claims whatsoever brought  
7 under any prior agreements at all. And, number two, it  
8 establishes new grants going forward.

9                   The sole subject matter of the operative  
10 paragraph which is the second paragraph is the copyrights  
11 of Joe Schuster. That is the sole subject matter. The  
12 first -- and, again, this is subject to New York law, and  
13 New York law says when you enter into an agreement -- and  
14 your Honor cites it in the tentative, I won't repeat  
15 it -- which supersedes prior agreements, those agreements  
16 are gone. And the second part of this is that there is a  
17 new grant going forward which is specific in the second  
18 sentence of that first paragraph.

19                   That grant of these rights is not subject to  
20 termination because it is after January 1, 1978. And  
21 this isn't the first case where this has come up, your  
22 Honor. Take the Steinbeck case. Elaine Steinbeck  
23 entered into a new agreement just like the Schusters in  
24 1994 instead of 1992. She, just like the Schusters, at  
25 the time had no termination right. She did not have any.

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1                   The reason she did not have any even though  
2                   she was the surviving spouse is because there were adult  
3                   children, and the law says you have to have more than  
4                   50 percent. And her children did not want to join with  
5                   her. She only had exactly 50 percent. And the case  
6                   makes clear that she had no right to terminate.

7                   THE COURT: Well, what rights did Jean Schuster  
8                   have to convey to DC?

9                   MR. PETROCELLI: That is precisely the correct  
10                   question, your Honor. And the rights that Jean Schuster  
11                   had was she stood as the executrix and the sole heir  
12                   under the will which, prior to this agreement, she had  
13                   filed papers with the California court. And we have  
14                   attached them to -- it is Exhibit 33 to my declaration, a  
15                   will made out in 1988, June 28, six years, four years  
16                   earlier where she was named the sole beneficiary and she  
17                   was also the executrix.

18                   And we also cited the law, and defendants  
19                   don't challenge it, that on the death of the decedent, in  
20                   this case, Joseph Schuster who died July 30, 1992, even  
21                   without probate, the rights vest immediately to the sole  
22                   beneficiary, in this case, Jean.

23                   THE COURT: What rights in Superman does Joe  
24                   Schuster have in his name?

25                   MR. PETROCELLI: Joe Schuster was a party to

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1 numerous contracts. Joe Schuster, whatever Joe Schuster  
 2 had the power to do the day before he died, let's say,  
 3 now Jean Schuster had the power to do it.

4 The reason why we have an agreement with Jean  
 5 Schuster is because she, as she had previously told DC in  
 6 correspondence that is before the court, she said she is  
 7 the heir. That is why they are dealing with her. The  
 8 only reason they are dealing with her is because she is  
 9 now Joe's representative. She is not a party to any  
 10 pension agreements or any personal agreements. There was  
 11 no financial obligation to her whatsoever.

12 THE COURT: When Joe Schuster died, what rights  
 13 did he have to Superman?

14 MR. PETROCELLI: Joe Schuster had copyrights that  
 15 he had granted, and he had the right to receive money  
 16 over the years. And he received that money. By the time  
 17 he died, his last contract he made said he wanted his  
 18 brother, Frank, to get money.

19 Okay. That is this last agreement that he  
 20 signed that was in 1975, and that provided for \$5,000 a  
 21 year to brother Frank and zero to anybody else.

22 THE COURT: But you know my question was, what  
 23 rights did he have in Superman?

24 MR. PETROCELLI: He had the right to enter into a  
 25 new agreement. He could have entered into a new

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1 agreement. And so what this document is is his  
 2 representative standing in his shoes, made a new  
 3 agreement. So if Joe had made this agreement the day  
 4 before, it would be -- we would be making the identical  
 5 argument that we are making now which is that his  
 6 representatives made this agreement.

7 This is not a personal agreement about  
 8 personal pension claims of Jean Schuster. She had no  
 9 personal pension claims. She had nothing. This is an  
 10 agreement that purports to get rid of all prior  
 11 agreements that Joe Schuster had with DC from the very  
 12 beginning through the very end and say all that is being  
 13 superseded now by this.

14 Secondly, it said you now grant to us any such  
 15 rights.

16 THE COURT: Okay. As we have discussed, those  
 17 rights were the right to receive a few bucks in the  
 18 pension payment.

19 MR. PETROCELLI: No. Here, the rights that are  
 20 referred to are the rights -- because it says any such  
 21 rights. So you have to look to the prior sentence to see  
 22 what any such rights means. And the prior sentence, I  
 23 believe, I don't know exactly what he put in front of  
 24 you, but I presume it is the copy of this agreement.

25 And the rights are, your Honor, claims to any

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1 payments or other rights or remedies which you may have  
2 under any agreement or otherwise whether now or hereafter  
3 existing regarding any copyrights, trademarks or other  
4 property right in any or all work created in whole or in  
5 part by your brother, Joseph Schuster, or any works based  
6 thereon. So, in any event, you now grant to us any such  
7 rights. In other words --

8 THE COURT: Okay. That is why I asked you. When  
9 he died, what rights did Joseph Schuster have in  
10 Superman?

11 MR. PETROCELLI: He had the right, as I  
12 indicated -- at the moment of his death? Or prior to his  
13 death?

14 THE COURT: I want to know what rights passed to  
15 Jean as a result of Joe Schuster's death.

16 MR. PETROCELLI: All of Joe Schuster's powers and  
17 rights and ability including to make a new agreement on  
18 his behalf.

19 THE COURT: Okay.

20 MR. PETROCELLI: And that is what this document  
21 is. In other words, it is not our position, your Honor,  
22 that this is a document whereby we were asking Jean to  
23 convey her personal rights because she had no personal  
24 rights.

25 This is a document that was entered into with

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1 her to convey the rights of Joe Schuster in the  
2 copyrights including the right to make a new grant of  
3 those copyrights especially given, especially given, that  
4 there had been the specific issue raised before this by  
5 her and her brother that they might have the ability to  
6 reclaim copyrights and terminate interest in the future.

7 THE COURT: Okay. Well, I can see why DC would  
8 basically want to tear up a clear, unequivocal grant of  
9 intellectual property in Superman from 1938. I can  
10 understand why they would tear that up for this ephemeral  
11 thing. That makes a lot of sense to me.

12 MR. PETROCELLI: By the way, the 1938 agreement  
13 itself that this replaces is a 1-page agreement. It is a  
14 simple 1-page grant. I mean I think that is in the  
15 record also.

16 THE COURT: That is when lawyers could get to the  
17 point. Those were the days.

18 MR. PETROCELLI: And, remember, they are not  
19 dealing with lawyers here, your Honor.

20 THE COURT: I know.

21 MR. PETROCELLI: They are dealing with  
22 individuals, and they are trying to obviously keep this  
23 simplistic. And the Steinbeck case, the Milne case, they  
24 all say when you enter into an agreement -- let me ask  
25 the same thing, your Honor, that you just asked me

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1 applied to in the John Steinbeck case. Elaine Steinbeck  
2 was his representative under his will, and she canceled  
3 prior grants and made new grants. In that case, the  
4 language was more specific than it is in this case.

5 And that takes us now to the New York cases on  
6 whether or not when the parties make a contract to  
7 replace and supersede all prior agreements and replace  
8 them with something new, how specific must that be in  
9 order for that to be upheld.

10 And we set out those various cases from New  
11 York which described that the ultimate test is not  
12 whether it is specific or explicit but what the intention  
13 of the parties is. The language, of course, is the most  
14 helpful guide to that, but the intention can be implied.

15 The intent we were talking about is the intent  
16 to supersede prior agreements and replace them with a new  
17 grant. We are not talking about an intent to waive or  
18 relinquish termination. That is not the operative intent  
19 here. The operative intent which would make this  
20 contract a new 1992 agreement going forward is when this  
21 contract is over, what do the parties think they have?

22 What the parties think they have is no more  
23 prior agreements that Joe entered into, Jean never  
24 entered into any agreements with DC. This wasn't  
25 canceling any of Jean's agreements. Frank never entered

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1 into any agreements with DC. All of this was about, and  
2 if you look at the wording, in simple terms, without a  
3 lot of legal verbosity, it is extremely all-encompassing  
4 and broad. Any and all rights. Any and all claims.  
5 Whether now or hereafter existing regarding any  
6 copyrights, trademarks or other property right in any and  
7 all work. You now grant that to us. You being the only  
8 person who has the legal power to grant that to us.

9 So now we have an explicit grant that is after  
10 1978, and when Congress came along in 1998 and passed  
11 this amendment to the termination law, they did not  
12 change this part. They kept the part intact that says  
13 your right to terminate only applies to grants and  
14 agreements prior to January 1, 1978.

15 So Milne and Steinbeck, both specifically deal  
16 with the question, and Steinbeck is most applicable here  
17 because Elaine Steinbeck like the Schusters in 1994 had  
18 no termination right. But she nonetheless entered into a  
19 new grant of rights on behalf of her deceased husband.

20 Milne, we have a new grant of rights in 1983.  
21 And so those two are the lead cases, one from the Second  
22 Circuit, one from the Ninth Circuit. And they both dealt  
23 with specifically the argument that Mr. Toberoff has been  
24 advancing whether or not you can make new grants that get  
25 rid of old agreements after 1978 and whether that

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1 extinguishes any new termination rights that might come  
2 along. And the court said, yes, it does because Congress  
3 could have said something different in the statute if  
4 they wanted. They could have said the right of  
5 termination applies to post-1978 grants in these  
6 circumstances. They did not.

7 And, bear in mind here, your Honor, that this  
8 says, fully settles all claims and agreements in the past  
9 which would include all of his copyright grants that he  
10 made in the past. So it is very clear that the intention  
11 here, it is straightforward in the sense that, look, you  
12 are coming back to us. We are going to take care of this  
13 once and for all, and, essentially, that is what Paul  
14 Levitz testified in that affidavit which is not refuted.  
15 Here is the deal, nothing more in the past, and here is  
16 where it is going forward.

17 And I want to explain something, your Honor,  
18 because it may not have been clear from our papers.  
19 Mr. Toberoff says that this is only about the 1975  
20 pension agreement. That was the last document that Joe  
21 Schuster signed. That document said Joe is supposed to  
22 get \$20,000 a year for the rest of his life. It turns  
23 out they gave him a lot more than that, but on his death  
24 it is supposed to go to his brother Frank for Frank's  
25 life. \$5,000. That is addressed in the first paragraph

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1 here where they decided to increase Frank's lifetime  
2 pension to give him more financial security from 5 to 25.

3                   And they entered into a separate agreement  
4 with Frank on the same day making clear, and that is  
5 Exhibit 9 to my -- to Mr. Levitz's declaration making  
6 clear that this waives any rights or remedies that he has  
7 under the agreement dated December 23, '75 between  
8 Warners and Mr. Schuster, Joseph Schuster.

9                   So the purpose of Exhibit 9 was to directly  
10 get rid of the '75 agreement because that was in an  
11 agreement where Frank was named specifically as a third  
12 party beneficiary and he could enforce. So that is the  
13 Frank Schuster agreement, Exhibit 9.

14                   When you go to the 1992 agreement which is  
15 Exhibit 8, this is not about a pension agreement for  
16 Frank's benefit. This is not about any other agreement  
17 for Jean's benefit. This is about Joe Schuster's  
18 copyrights. That is the sole subject matter of the  
19 operative paragraph here. And the reason --

20                   THE COURT: Okay. Mr. Petrocelli. All right. I  
21 understand.

22                   MR. PETROCELLI: You got it.

23                   THE COURT: You have made that.

24                   All right. The matter stands submitted.  
25 Thank you, counsel.

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1 MR. PETROCELLI: Thank you.

2 MR. TOBEROFF: Thank you.

3 (Proceedings concluded.)

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1 CERTIFICATE

2

3

4 I hereby certify that pursuant to Section 753, Title 28,  
5 United States Code, the foregoing is a true and correct  
6 transcript of the stenographically reported proceedings held  
7 in the above-entitled matter and that the transcript page  
8 format is in conformance with the regulations of the  
9 Judicial Conference of the United States.

10 Date: September 10, 2012

11

12 /s/ Katie Thibodeaux, CSR No. 9858, RPR, CRR

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UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA